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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STEPHEN IVY AND CHARLENE IVY,
Petitioners,

v.

ROBERT W. MYERS,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Of Counsel:
ROBERT W. NIXON
WALTER E. CARSON
12501 Old Columbia Pike
Silver Spring, MD 20904
ROLLAND TRUMAN
4522 Greenmeadow Road
Long Beach, CA 90808
HAROLD LANCE
204 N. San Antonio Avenue
Ontario, CA 91762

LEE BOOTHBY
(COUNSEL OF RECORD)
BOOTHBY & YINGST
9047 US 31 North, Suite 201
P.O. Box 268
Berrien Springs, MI 49103
(616) 471-7787
Attorney for Council on Religious Freedom, as Amicus Curiae

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

STATEMENT OF THE CASE 3

ARGUMENT I

CERTIORARI SHOULD BE GRANTED TO EXAMINE THE QUESTION OF WHETHER THE PAYMENT OF TITHE OR OTHER RELIGIOUS CONTRIBUTIONS SHOULD BE INTERPRETED TO BE A "REASONABLE AND NECESSARY" LIVING EXPENSE UNDER CHAPTER 13 OF THE FEDERAL BANKRUPTCY LAW. 6

ARGUMENT II

CERTIORARI SHOULD ALSO BE GRANTED TO DETERMINE WHETHER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT REQUIRES A DETERMINATION THAT TITHE AND OTHER RELIGIOUS CONTRIBUTIONS MAY BE ALLOWED IN A CHAPTER 13 PLAN. 8

ARGUMENT III

THE LOWER COURTS FAILED TO APPLY THE PROPER CONSTITUTIONAL ANALYSIS WHEN DETERMINING WHETHER PETITIONERS' CHAPTER 13 PLAN, INCLUDING RELIGIOUS CONTRIBUTIONS, SHOULD BE ALLOWED 11

CONCLUSION 16

TABLE OF AUTHORITIES

CASES: Page

In re Bien, 95 Bankr. 281 (Bankr. D. Conn. 1989) 7

In re Curry, 77 Bankr. 969 (Bankr. S.D. Fla. 1987)..... 4

In re Davis, 68 Bankr. 205 (Bankr. S.D. Ohio 1986) 7

Employment Div., Dep't of Human Resources v. *Smith*, ___ U.S. ___, 110 S. Ct. 1595 (1990), *rehearing denied*, 110 S. Ct. 2605 (1990)..... 3, 13, 14, 15

Everson v. *Bd. of Educ.*, 330 U.S. 1 (1947)..... 15

In re Green, 73 Bankr. 893 (Bankr. W.D. Mich. 1987), *aff'd*, 103 Bankr. 853 (W.D. Mich. 1988)..... 7

Heffron v. *International Soc. for Krishna Consciousness*, 452 U.S. 640 (1981) 7

In re Navarro, 83 Bankr. 348 (Bankr. E.D. Pa. 1988)... 7

NLRB v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) 8

St. Martin Evanglical Lutheran Church v. *South Dakota*, 451 U.S. 772 (1981)..... 7

Sherbert v. *Verner*, 374 U.S. 398 (1963)..... 3, 11, 12, 14, 15

Wallace v. *Jaffree*, 472 U.S. 38 (1985)..... 3, 12, 13

In re Wood, 92 Bankr. 264 (Bankr. S.D. Ohio 1988)..... 7

CONSTITUTIONAL AND STATUTORY AUTHORITIES:

U.S. Const. amend I..... 3, 6, 8, 9, 11, 12

11 U.S.C. § 1325(a)(3) 5

11 U.S.C. § 1325(b) 7

OTHER AUTHORITIES:

Kendall, *Tithing: A Call to Serious Biblical Giving* 29 (1982) 9

Luke 11:42..... 9

McKay, *Gospel Ideals* 197 (1953)..... 10

Malachi 3:10..... 9

Powell, *Money and the Church* 224-5 (1962) 9

Seventh-day Adventist Church Manual 29 (1990) 10

White, Counsels on Stewardship 82 (1940) 10

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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

The Council on Religious Freedom is a national non-profit corporation which was formed to uphold and promote the principles of religious liberty. Its Board of Directors is composed of individuals, some in an official capacity and some on a lay basis, who are active in religious affairs and who recognize the importance of preserving and promoting the constitutional principle of the free exercise of religion and opposing any encroach-

ment by private or governmental agencies, including the judicial branch of government, which limits or tends to inhibit the free exercise of religion. The Council on Religious Freedom therefore opposes government burdens on religious practices or government actions requiring an individual to choose between the practice of his or her religion and governmental benefits otherwise available to him.

This case, amicus believes, requires this Court to interpret the federal bankruptcy statute in connection with certain religious beliefs and practices and, if necessary, determine what effect the Free Exercise and Establishment Clauses of the First Amendment may have on the confirmation of Chapter 13 plans under the federal bankruptcy law.

Both petitioners and respondent, through their respective counsel of record, have consented to the filing of this brief. Their letters of consent accompany the filing of this brief.

SUMMARY OF ARGUMENT

The Bankruptcy Court refused to allow petitioners' Chapter 13 plan for the sole reason that they had included as part of their "reasonable and necessary" living expenses an entry for "tithe" payments to their church.

The bankruptcy statute has not clearly stated whether the inclusion of religious contributions are proper even though the Official Form has provided a space to list "religious and other charitable contributions." Because any prohibition against including religious contributions as part of a debtor's Chapter 13 plan would raise important and sensitive constitutional concerns, the Act should

be construed to permit the inclusion of such contributions in an approvable plan.

The courts below all failed to apply First Amendment analysis when determining that the plan was not approvable under Chapter 13 of the Bankruptcy Act. The Petition for Writ of Certiorari should be granted to determine whether the Free Exercise Clause of the First Amendment requires a determination that tithe and other religious contributions may be properly allowed as part of a Chapter 13 plan.

This case is not unlike *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and the test set forth therein should be applied since the benefits provided by government under Chapter 13 are similar to the employment benefits at issue in *Sherbert*. The *Sherbert* analysis should also be coupled with Justice O'Connor's further analysis concerning the "apparent" conflict between free exercise interests and establishment concerns as set forth in her concurring opinion in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985).

This case is clearly distinguishable from *Employment Div., Dep't of Human Resources* v. *Smith*, ___ U.S. ___, 110 S. Ct. 1595 (1990), *rehearing denied*, 110 S. Ct. 2605 (1990), since it does not involve conduct made criminal and lends "itself to individualized governmental assessment of the reason for the relevant conduct." *Id.* at 1603.

This case demonstrates the need for judicial guidance concerning federal legislation in an area where, today, the lower courts, as well as counsel, have no clear legislative or judicial chart to follow.

STATEMENT OF THE CASE

This case came before the Bankruptcy Court on Petitioners Stephen and Charlene Ivys' Motion for Con-

firmation of their Chapter 13 plan under the federal bankruptcy statute. The Bankruptcy Court denied confirmation of the plan on the basis that the debtors' household budget contained an expense entry of $365.00 per month for a "tithe" to debtors' church. The Ivys are members of the Hillsboro Church of the Nazarene. The Church of the Nazarene follows Christian tenets which mandate tithing of one's income—that is the contribution of 10% of one's income to the church annually. The Ivys sincerely believe that it would be a violation of the teachings of their church as well as their own personal religious convictions if they decreased or deleted their contributions to the church.

The Bankruptcy Court, somewhat paradoxically, refused to allow the deduction and denied confirmation on the grounds that such a plan was not proposed in good faith, although no interested party filed objection to confirmation. The Bankruptcy Court in its supplemental opinion adopted the language of the Bankruptcy Court in the case of *In re Curry*, 77 Bankr. 969 (Bankr. S.D. Fla. 1987), which stated:

> Good faith requires, at least, that the debtor is willing to pay to the trustee for the benefit of his creditors all of his disposable income after provision for his necessary and reasonable living expenses and a reasonable contingency. A charitable contribution, at least to the degree provided in this case, does not constitute a reasonable necessary living expense. The effect of such a deduction is to permit the debtor to require that his creditors contribute to his chosen charity. I do not believe that the statute contemplates such a result nor do I consider that I have discretion to permit this debtor to achieve that result.
>
> I do not overlook the fact that there are published opinions by several of my colleagues who have

> reached a contrary result. Nor have I overlooked the fact that Official Form 10, authorized by B.R. 9009, provides a space to list "religious and other charitable contributions" in the debtor's budget, item 4(b)(15). The Official Forms do not override the statute. They were not approved by Congress nor by the Rules Committee. Therefore, they provide no indication of legislative intent. The Forms, though prescribed by the Judicial Conference (B.R. 9009) do not, I take it, constitute judicial precedent that religious and charitable contributions may, in effect, be imposed by a Chapter 13 debtor upon his creditors.

(*See* Appendix C at App. 9-10 as set forth in the Petition for Writ of Certiorari.)

The United States District Court for the District of Oregon, reviewing the Bankruptcy Court's decision *de novo*, sustained the bankruptcy judge's decision holding that 11 U.S.C. § 1325(a)(3) (1985) requires that the plan be proposed in good faith and that "[g]ood faith requires that debtors be willing to pay their trustees, for the benefit of their creditors, all of their disposable income after provision for their necessary and reasonable living expenses in a reasonable contingency." (*See* Appendix B at App. 6-7 to the Petition for Writ of Certiorari.)

The case was appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit avoided ruling on the question of whether tithe constitutes a "reasonable and necessary" living expense or whether denial of the plan amounted to an unconstitutional infringement of the Ivys' freedom to practice their religion. (*See* Appendix A at App. 3 to the Petition for Writ of Certiorari.) In denying the plan, the Bankruptcy Court indicated that it would confirm an amended plan that allowed the proposed monthly tithe if the Ivys would extend their 24 monthly payments of $745 an additional 18 months.

The Ivys argue that the burden on the free exercise of religion is not avoided by the bankruptcy judge's proposal to extend the plan for 18 months since the proposed extension would discriminate by requiring the Ivys to pay more and being under the jurisdiction of the Bankruptcy Court longer than a non-tithing debtor in the same circumstances, thereby placing substantial burdens on the debtors' right to freely exercise their religion. (Petition for Certiorari at 6.)

The trustee in bankruptcy argued in his brief before the Ninth Circuit that confirmation of a Chapter 13 plan providing for a church tithe is not required by the Free Exercise Clause and in fact would violate the Establishment Clause because it would "'convey a message that religion or a particular religious belief is favored or preferred.'" (Brf. of Trustee-Appellee Robert W. Myers filed in Ninth Circuit Court of Appeals at 12).

ARGUMENT I

CERTIORARI SHOULD BE GRANTED TO EXAMINE THE QUESTION OF WHETHER THE PAYMENT OF TITHE OR OTHER RELIGIOUS CONTRIBUTIONS SHOULD BE INTERPRETED TO BE A "REASONABLE AND NECESSARY" LIVING EXPENSE UNDER CHAPTER 13 OF THE FEDERAL BANKRUPTCY LAW.

Council on Religious Freedom believes that certiorari should be granted in this case to examine the question of whether the payment of tithe or other religious contributions, as mandated by an individual's religious beliefs, should be interpreted to be a "reasonable and necessary" expense in a Chapter 13 plan or whether, conversely, the inclusion of such amount should require a determination that the plan was not proposed in good faith for the sole reason that such contributions were included as part of the plan.

Numerous district court decisions have specifically addressed the propriety of religious contributions being made by a debtor during his Chapter 13 plan. Four cases hold that a religious contribution is a "reasonable and necessary" expenditure. *See In re Bien*, 95 Bankr. 281 (Bankr. D. Conn. 1989); *In re Navarro*, 83 Bankr. 348 (Bankr. E.D. Pa. 1988); *In re Wood*, 92 Bankr. 264 (Bankr. S.D. Ohio 1988); and *In re Davis*, 68 Bankr. 205 (Bankr. S.D. Ohio 1986). One case, *In re Green*, 73 Bankr. 893 (Bankr. W.D. Mich. 1987), *aff'd*, 103 Bankr. 853 (W.D. Mich. 1988), held that a denial of confirmation on the basis of a religious contribution would violate the Free Exercise Clause of the First Amendment and also concluded that confirmation did not violate the Establishment Clause.

Although the conflict between bankruptcy courts on this issue does not by itself justify the granting of certiorari, more is at stake here. The free exercise implications of such cases strongly suggest that there be uniformity in addressing debtor plans implicating religious benefits and practices that require confirmation by a federal judge. *See St. Martin Evanglical Lutheran Church* v. *South Dakota*, 451 U.S. 772, 780 n.10 (1981), and *Heffron* v. *International Soc. of Krishna Consciousness*, 452 U.S. 640, 646 (1981).

A reading of 11 U.S.C. § 1325(b) fails to clearly disclose whether the payment of tithe as mandated by an individual's religious belief should be included as a "reasonable and necessary" living expense. With the increase of bankruptcy filings, bankruptcy judges are without guidance as to whether a plan (including the payment of tithe or other religious contributions) should be viewed as having been made in good faith. Likewise, those individuals who find it necessary to seek the protection and benefit of Chapter 13

proceedings have no guidance as to whether they may proceed with a Chapter 13 plan when their religion dictates that 10% of their income be paid as tithe to their church.

This amicus believes that failure to include the payment of religious contributions mandated by an individual's religious beliefs as a "reasonable and necessary" expense by necessity raises sensitive questions of First Amendment concern. This Court in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979), expressly held that "in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the [National Labor Relations] Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."

This case involves, in part, the interpretation of a federal statute. Although the amount of money involved may appear to be insignificant, the principle is not. Because we are dealing with those in financial distress, it is unlikely that this Court will be asked again soon to review this question. But that does not mean that the question raised is seldom seen at the bankruptcy court level. Unfortunately, many debtors face this unsettled, but important, area of the law with no finances to bring the issue before the courts. For this reason, this Court should grant the Petition for Writ of Certiorari.

ARGUMENT II

CERTIORARI SHOULD ALSO BE GRANTED TO DETERMINE WHETHER THE FREE EXERCISE CLAUSE OF THE FIRST AMENDMENT REQUIRES A DETERMINATION THAT TITHE AND OTHER RELIGIOUS CONTRIBUTIONS MAY BE ALLOWED IN A CHAPTER 13 PLAN.

The Council on Religious Freedom also believes that the petition should also be granted for the purpose of

examining whether the Free Exercise Clause of the First Amendment requires a determination that tithe and other contributions mandated by an individual's religious beliefs should be considered to be "reasonable and necessary" in a Chapter 13 plan or whether conversely such an allowed expense would constitute a violation of the Establishment Clause as argued by the trustee in bankruptcy below.

For many believers, tithing is a Bible-based mandate. Malachi 3:10, a text in the Old Testament, sets forth the principle of tithing followed by many churches, stating: "Bring ye all the tithes into the storehouse, that there may be meat in mine house, and prove me now herewith, saith the Lord of hosts, if I will not open you the windows of heaven, and pour you out a blessing, that there shall not be room enough to receive it." And the New Testament, quoting the words of Christ, states in Luke 11:42: "But woe unto you, Pharisees! for ye tithe mint and rue and all manner of herbs, and pass over judgment and the love of God; these ought ye to have done, and not to leave the other undone." A contemporary author defines the concept this way: "Christian tithing is the self-discipline of setting aside regularly for Christ's work a tithe of one's income as an acknowledgment of God's ownership of all things, including man himself, and as a response to God's love as revealed in Jesus Christ." Kendall, *Tithing: A Call to Serious Biblical Giving* 29 (1982).

Tithing is an important aspect of church life in many religious groups. One study, based on statistics supplied by the Department of Stewardship and Benevolence of the National Council of Churches, indicated that ten Protestant denominations "placed strong emphasis upon tithing" and another ten generally encouraged tithing. Powell, *Money and the Church* 224-5 (1962).

Some denominations consider tithing to be a core religious belief. The Seventh-day Adventist Church, for example, states this in its fundamental belief on stewardship:

> We are God's stewards, entrusted by Him with time and opportunities, abilities and possessions, and the blessings of the earth and its resources. We are responsible to Him for their proper use. We acknowledge God's ownership by faithful service to Him and our fellow men, and by returning tithes and giving offerings for the proclamation of His gospel and the support and growth of His church.

Fundamental Belief 20, *Seventh-day Adventist Church Manual* 29 (1990). A co-founder of the Seventh-day Adventist Church, Ellen G. White, commented on the temporal blessings that are bestowed on the faithful:

> Whenever God's people, in any period of the world, have cheerfully and wilfully carried His plan in systematic benevolence and in gifts and offerings, they have realized the standing promise that prosperity should attend all their labors just in proportion as they obeyed His requirements. When they acknowledged the claims of God, and complied with His requirements, honoring Him with their substance, their barns were filled with plenty.

White, *Counsels on Stewardship* 347 (1940).

Another denomination, the Church of Jesus Christ of Latter-day Saints, also strongly promotes the tithing concept. The ninth president of that church, David O. McKay, stated that to Latter-day Saints "tithing is as much a law of God as is baptism." McKay, *Gospel Ideals* 197 (1953). McKay continued by noting that in addition to the social and temporal benefits of tithing, it "makes its greatest appeal to the sincere mind because of its spiritual signifi-

cance. It is an unfailing source of spiritual power." *Id.* at 199.

To tithepayers, there is no question but the return of tithe is a "reasonable and necessary" living expense. In fact, in keeping with the teachings of the Bible, many tithepayers believe that their secular labors will not be blessed if they do not abide by the Biblical plan of tithepaying. They normally are willing to sacrifice what other debtors might consider to be a "reasonable and necessary" expense in order to meet this Bible-mandated commitment to God.

None of the courts below applied First Amendment analysis in arriving at their decisions. This amicus believes that this case should be reviewed by this Court to ascertain if First Amendment principles are at stake and should have been considered by the lower courts.

ARGUMENT III

THE LOWER COURTS FAILED TO APPLY THE PROPER CONSTITUTIONAL ANALYSIS WHEN DETERMINING WHETHER PETITIONERS' CHAPTER 13 PLAN, INCLUDING RELIGIOUS CONTRIBUTIONS, SHOULD BE ALLOWED.

Under traditional free exercise analysis, as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), a substantial argument may be made that prohibiting the inclusion of a tithe expense as a regular part of a Chapter 13 plan, or a judicial conclusion that the inclusion of such an expense must result in the plan being found not to have been made in good faith, is violative of the Free Exercise Clause. The Bankruptcy Court's interpretation of Chapter 13 would in fact require the individual seeking the benefits of the bankruptcy statute to choose between his religious beliefs and the benefits afforded to other debtors under the bank-

ruptcy laws and/or place a greater burden on the debtor who sincerely believes that God has a prior claim to 10% of the individual's increase.

The bankruptcy judge and the courts below all failed to weigh on constitutional scales petitioners' request for inclusion of tithing in their Chapter 13 plan. Each court declined entirely to consider the impact of either the Free Exercise or Establishment Clauses in their determination. The benefits provided for an individual in financial distress under Chapter 13 are not unlike the benefits government has provided for individuals who find themselves unemployed. This Court held in *Sherbert* v. *Verner*, 374 U.S. at 404, that to disqualify an individual from unemployment benefits because of that person's inability to work during the hours of the individual's Sabbath places the same kind of burden upon the free exercise of religion as would a fine imposed against . . . [the individual] for her Sabbath worship." To condition an acceptable Chapter 13 plan on the exclusion of religious contributions has exactly the same effect.

Council on Religious Freedom believes that the lower courts should have utilized the analysis set forth by Justice O'Connor in her concurring opinion in *Wallace* v. *Jaffree*, 472 U.S. 38 (1985), where, in evaluating the apparent conflict between the Free Exercise and Establishment Clauses of the First Amendment, she stated:

> The solution to the conflict between the Religion Clauses lies not in "neutrality," but rather in identifying workable limits to the government's license to promote the free exercise of religion. The text of the Free Exercise Clause speaks of laws that prohibit the free exercise of religion. On its face, the Clause is directed at government interference with free exercise. Given that concern, one can plausibly assert that government pursues Free Exercise Clause

> values when it lifts a government-imposed burden on the free exercise of religion. If a statute falls within this category, then the standard Establishment Clause test should be modified accordingly. It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion by lifting a government-imposed burden. Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause. I would also go further. In assessing the effect of such a statute—that is, in determining whether the statute conveys the message of endorsement of religion or a particular religious belief—courts should assume that the "objective observer," *supra*, at 2500, is acquainted with the Free Exercise Clause and the values it promotes. Thus individual perceptions, or resentment that a religious observer is exempted from a particular government requirement, would be entitled to little weight if the Free Exercise Clause strongly supported the exemption.

Id. at 83.

The trustee in bankruptcy argued to the Ninth Circuit that this Court's recent decision in *Employment Div., Dep't of Human Resources* v. *Smith*, ___ U.S. ___, 110 S. Ct. 1595 (1990), *rehearing denied*, 110 S. Ct. 2605 (1990), forecloses petitioners' free exercise claim. In *Smith* this Court held that there should be no exemption from a generally applicable criminal law under the *Sherbert* test. But in *Smith* this Court noted that "a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment." *Smith*, 110 U.S. at 1603. The Court in *Smith* noted that the "good cause" standard which exists in unemployment compensation statutes "create[s] a mechanism for individualized exemptions."

Likewise, when a bankruptcy judge considers a Chapter 13 plan for approval, the judge must consider the "good faith" aspect of the petitioner when submitting a plan for approval. In fact, without the overlay of the *Sherbert* test in Chapter 13 confirmation hearings involving a plan which includes religious contributions, the decision as to approval or disapproval will tend to depend on the predilections of the court—not the beliefs of the petitioner—as to the reasonable necessity for that specific expense item.

An individual seeking the protection and benefits of Chapter 13 should not be forced to delegate to government the decision of whether it is a necessity to include a religious contribution as part of a household expense. That can and must be a matter that remains between the individual and his God. It likewise cannot, in our system of government, be left solely to the courts.

This case, however, must be differentiated from *Smith* because the bankruptcy statute here at issue is a law that lends "itself to individualized governmental assessment of the reason for the relevant conduct." *Id.* at 1603. The bankruptcy judge, in reviewing the Chapter 13 plan, must make an individual determination as to whether the religious contribution is a "reasonable and necessary" expense and whether the inclusion of such an expense in the plan nullifies the plan on the basis that it was not made in good faith. Also, the benefit at issue here—protection under Chapter 13 of the Bankruptcy Act—more closely approximates the benefit at issue in *Sherbert* v. *Verner*, and its progeny, than the criminal conduct which gave rise to the decision in *Smith*.

This Court has recently acknowledged that it has "on three occasions, invalidated state unemployment compen-

sation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion." *Smith*, 110 S. Ct. at 1602. This Court should determine whether a Chapter 13 plan and the benefits derived by petitioners under such a plan should be conditioned upon a petitioner's willingness to abandon an equally important precept of his religious faith.

In *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 16 (1947), and later in *Sherbert* v. *Verner*, 374 U.S. at 410, this Court stated the constitutional principle that government cannot "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."

A determination that a tithepayer must be excluded or treated differently than a non-tithepayer in the bankruptcy court's approval of a Chapter 13 plan contradicts the constitutional principle expressed in *Everson* and *Sherbert*.

The fact that bankruptcy courts have held both for and against inclusion of religious contributions as part of an approved Chapter 13 plan demonstrates that, without guidance from this Court, this sensitive religious issue will be left to the whims or caprice of the individual bankruptcy judges. Presently, courts and counsel are at a loss to know when the principles of *Sherbert* may still be applied. This case presents an opportunity for this Court to further address that question and to give guidance on such an important and sensitive constitutional concern.

CONCLUSION

For the foregoing reasons, this amicus curiae respectfully requests that the Petition for Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

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Respectfully submitted,

Of Counsel:
ROBERT W. NIXON
WALTER E. CARSON
12501 Old Columbia Pike
Silver Spring, MD 20904
ROLLAND TRUMAN
4522 Greenmeadow Road
Long Beach, CA 90808
HAROLD LANCE
204 N. San Antonio Avenue
Ontario, CA 91762

LEE BOOTHBY
(COUNSEL OF RECORD)
BOOTHBY & YINGST
9047 US 31 North, Suite 201
P.O. Box 268
Berrien Springs, MI 49103
(616) 471-7787
Attorney for Council on Religious Freedom, as Amicus Curiae